Supreme Court, U.S.
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NO. 06-713 and NO. 06-730

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON STATE GRANGE,
Petitioner,

v.

WASHINGTON STATE REPUBLICAN PARTY; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; LIBERTARIAN PARTY OF WASHINGTON STATE; ET AL.,
Respondents.

STATE OF WASHINGTON, ET AL.,
Petitioners,

v.

WASHINGTON STATE REPUBLICAN PARTY; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; LIBERTARIAN PARTY OF WASHINGTON STATE; ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER WASHINGTON STATE GRANGE

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QUESTION PRESENTED FOR REVIEW

In *California Democratic Party v. Jones*, 530 U.S. 567, 585-586 (2000), this Court specified how States could structure a top-two primary system that does not violate the associational rights of a political party. The State of Washington subsequently enacted a top-two primary statute that the Washington State Grange had specifically drafted to comply with this Court's ruling in *Jones*. As counsel of record for the lead Respondent in this case has explained, that statute "enacted a two-stage election with a 'winnowing' primary under which all candidates who file would appear on the ballot in the first stage, and a run-off between the top two in the second stage." JA 692. One clause in Washington's new statute also allows a person running for certain offices to disclose on the ballot the name of the party (if any) that he or she personally prefers.

The Ninth Circuit invalidated Washington's top-two statute in its entirety, holding that the First Amendment prohibits a State from allowing a person running for public office to disclose the name of the party he or she personally prefers on the ballot. This case accordingly presents the following question:

Does the First Amendment prohibit a State from allowing a person running for public office to disclose the name of the party he or she personally prefers on the ballot?

PARTIES TO THE NINTH CIRCUIT PROCEEDING WHOSE JUDGMENT IS UNDER REVIEW

Defendant Washington State Grange: The Washington State Grange is the Petitioner in case no. 06-713. The Grange is described at JA 675-77. It sponsored the voter-approved Initiative Measure that enacted the top-two statute at issue. The Grange was aligned as Defendant-Intervenor in the U.S. District Court and as Appellant in the Ninth Circuit Court of Appeals.

Co-Defendants of the Grange: The Grange's co-defendants are the Petitioners in the related case no. 06-730. They are the State of Washington, its Attorney General Rob McKenna, and its Secretary of State Sam Reed. They were aligned with the Grange as Defendant-Intervenors in the U.S. District Court and as Appellants in the Ninth Circuit Court of Appeals. The U.S. District Court also substituted the State for the County Auditors who were the initial defendants in the trial court.

Plaintiffs: The Washington State Republican Party and its officials Diane Tebelius, Bertabelle Hubka, Steve Neighbors, Mike Gaston, Marcy Collins, and Michael Young; Washington State Democratic Central Committee and its official Paul Berendt; Libertarian Party of Washington State and its officials Ruth Bennett and J.S. Mills, are the Respondents in both case nos. 06-713 & 06-730. They collectively were aligned as Plaintiffs and Plaintiff-Intervenors in the U.S. District Court and as Appellees in the Ninth Circuit Court of Appeals.

TABLE OF CONTENTS

RELIEF SOUGHT 1

OPINIONS & ORDERS BELOW 1

BASIS FOR JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED 2

A. United States Constitution 2

B. Washington State Constitution 2

C. Washington's Prior Party-Nominating Statute ("Montana" system) 4

D. Washington's Top-Two Statute (Initiative 872) 5

STATEMENT OF THE CASE 7

A. Summer 2000: This Court Strikes Down California's Party-Nominating Primary In *Jones*. 7

B. Fall 2003: Washington's Prior Party-Nominating Primary Is Struck Down In Reliance on *Jones*. 9

C. Spring 2004: Washington Adopts A "Montana" System In Response To *Jones* 10

D. Fall 2004: Washington Voters Replace The "Montana" System With A Top-Two System In Reliance On *Jones* (Initiative 872). 11

E. Summer 2006: Ninth Circuit Invalidates Washington's Top-Two Statute. 16

1. U.S. District Court Proceedings. 16

2. Ninth Circuit Proceedings. 16

3. The Ninth Circuit Decision. 17

SUMMARY OF ARGUMENT 18

ARGUMENT 21

A. The Ninth Circuit's Decision Turns The First Amendment On Its Head. 21

1. The Ninth Circuit properly recognized that every American running for office has a Constitutional right to state the name of the political party he or she prefers. 21

2. The Ninth Circuit improperly held that the First Amendment prohibits a State from allowing persons running for office to make his or her personal preference statement on the ballot. 22

B. The Ninth Circuit's Decision Also Contradicts This Court's Ruling In *Jones*. 29

1. Washington's top-two statute complies with *Jones*. 29

2. Different States have accordingly enacted different types of statutes that establish different types of election systems. 44

3. Citing what *other* States have done to define what *Washington* State must have done converts Federalism's freedom into a prison..... 46

CONCLUSION 48

2. The fact that a party has the right to select *its* candidate does not negate the Washington statute's compliance with *Jones*. 32

3. The fact that a party has the right to dictate its "membership" does not negate the Washington statute's compliance with *Jones*. 34

4. *Jones* compliance conclusion. 37

C. Revising The Washington Statute's "Candidate's Preference" Language To Instead Say "Party's Nominee" Violates Separation Of Powers. 37

1. The separation of powers doctrine prevents courts from re-writing statutes. 37

2. The Ninth Circuit's ruling is premised on re-writing "candidate's preference" to instead say "party's nominee" 38

3. Resort to "interpretation" does not justify re-writing the "candidate's preference" language of Washington's statute in order to strike it down. 39

4. Separation of powers conclusion 43

D. Confining *Washington* State To What *Other* States Have Done Transforms The Independence That Federalism Grants Into A Prison. 43

1. Federalism protects each State's freedom to serve as a laboratory of democracy. 43

TABLE OF AUTHORITIES

Cases

Ayotte v. Planned Parenthood of Northern New England,
546 U.S. 320, 126 S. Ct. 961 (2006) 37

Barson v. DSHS,
794 P.2d 538 (Wash. App. 1990) 26

California Democratic Party v. Jones,
530 U.S. 567 (2000)
..... 7-9, 23, 29-31, 44-46, 47, passim

Cantwell v. State of Connecticut,
310 U.S. 296 (1940) 25-26

Citizens for Responsible Wildlife Management v. State,
71 P.3d 644 (Wash. 2003) 41

Clingman v. Beaver,
544 U.S. 581 (2005) 44-45

Democratic Party of Washington v. Reed,
343 F.3d 1198 (9th Cir. 2003) 10-11, 45-46, 47

Duke v. Cleland,
954 F.2d 1526 (11th Cir. 1992) 36, 45, 47

Duke v. Massey,
87 F.3d 1226 (11th Cir. 1996) 36, 45, 47

Eu v. San Francisco County Democratic Central Committee,
489 U.S. 214 (1989) 27

Gregory v. Ashcroft,
501 U.S. 452 (1991) 43-44

Grossman v. Will,
516 P.2d 1063 (Wash. App. 1973) 26

Heart of Atlanta Hotel v. U.S.,
379 U.S. 241 (1964) 37

Hurley v. Irish-American Gay, Lesbian & Bisexual Group,
515 U.S. 557 (1995) 36

In re Estate of Niehenke,
818 P.2d 1324 (Wash. 1991) 26

LaRouche v. Fowler,
152 F.3d 974 (D.C. Cir. 1998) 36

McGowen v. State,
60 P.3d 67 (Wash. 2002) 38, 41

Monitor Patriot v. Roy,
401 U.S. 265 (1971) 27

New State Ice v. Liebmann,
285 U.S. 262 (1932) 44, 48

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 25

Orient Foundation v. Coleman,
60 P.3d 595 (Wash. App. 2002) 40

Personal Restraint Petition of Matteson,
12 P.3d 585 (Wash. 2000) 40-41

Printz v. U.S.,
521 U.S. 898 (1997) 44

Public Disclosure Commission v. 119 Vote No! Committee,
957 P.2d 691 (Wash. 1998) 25

Republican Party of Minnesota v. White,
536 U.S. 765 (2002) 27, 28

Republican Party of Minnesota v. White,
416 F.3d 738 (8th Cir. 2005) 27

Rosen v. Brown,
970 F.2d 169 (6th Cir. 1992) 45, 47

Scales v. U.S.,
367 U.S. 203 (1961) 40

State v. Chapman,
998 P.2d 282 (Wash. 2000) 38, 39

State v. Enstone,
974 P.2d 828 (Wash. 1999) 40

Tashjian v. Republican Party of Connecticut,
479 U.S. 208 (1986) 45, 47

Terrace Heights Sewer District v. Young,
473 P.2d 414 (Wash. App. 1970) 26

Texas v. White,
7 Wall 700, 19 L. Ed. 227 (1869) 43

Timmons v. Twin City Area New Party,
520 U.S. 351 (1997) 24, 47

U.S. v. Booker,
534 U.S. 220, 125 S. Ct. 738 (2005) 41

U.S. v. Morrison,
529 U.S. 598 (2000) 44

Watson v. Wash. Preferred Life Insurance,
502 P.2d 1016 (Wash. 1972) 26

Whalen v. Roe,
429 U.S. 589 (1977) 44, 48

Constitutions

U.S. Constitution, amend. I ..... 2, passim
U.S. Constitution, amend. XIV 2
Wash. Const. art. II, §1 ..... 2-4, 11-12, 38

Statutes & Administrative Codes

28 U.S.C. §1331 ..... 1, 16
28 U.S.C. §1343 ..... 1, 16
Initiative 872 ..... 5-7, 11-16, passim
Initiative 872, §4 ..... 5, 13, 38, 42
Initiative 872, §5 ..... 6, 31
Initiative 872, §6(1) 6, 12-13, 31
Initiative 872, §7(3) 34, 38
Initiative 872, §9(3) 38
Initiative 872, §12 38
Cal. Elec. Code §15451 (1996 version) 7-8, 46
Montana Code. Ann. §§13-10-209,- 301 (2005) 10
Georgia Code §21-2-193 (1987) 45
Georgia Code §21-2-224 (2006) 10
Hawaii. Rev. Stat. §12-31 (2005) 10
Idaho Code Ann. §34-904 (2006) 10
Mich. Comp. Laws §§168.576, .570 (2006) 10
Minnesota Stat. §204D.08 (2006) 10

Missouri. Rev. Stat. §115.397 (2006) 10

North Dakota Cent. Code §16.1-11-22 (2005) 10

Ohio Rev. Code §3505.03 (1986) 45

Vermont. Stat. Ann. tit. 17 §§2262, 2263 (2005)..... 10

Virginia Code Ann. §24.2-530 (2006)..... 10

Wisconsin Stat. §§5.58, 5.62 (2005) 11

Wash. Rev. Code §29A.04.086..... 40

Wash. Rev. Code §29A.04.128
(version before I-872) 4, 11

Wash. Rev. Code §29A.36.191
(version before I-872) 4, 11

Wash. Rev. Code §29A.52.151 (2006) 10

Wash. Rev. Code §29.30.020(3)
(pre-2003 version) 9-10, 45-46

Wash. Rev. Code §29.30.095
(pre-2003 version) 9-10, 45-46

Wash. Rev. Code §42.17.020(10)..... 40

Wash. Admin. Code 434-215-012
(version before I-872).....5, 10, 11, 14, 45-46

Wash. Admin. Code 434-215-012
(version during I-872) 6, 14

Wash. Admin. Code 434-262-012
(version under I-872) .. 6-7, 14-15, 31-32, 33, 38-39

Additional Authorities

Webster's Ninth New Collegiate
Dictionary (1991) 35

RELIEF SOUGHT

The Washington State Grange respectfully seeks a reversal of the Ninth Circuit decision invalidating Washington's top-two election statute (Initiative 872).

OPINIONS & ORDERS BELOW

The Ninth Circuit's opinion is reported at 460 F.3d 1108 (Grange Pet. App. 1a-34a). Its others orders are unpublished (Grange Pet. App. 101a-111a).

The District Court's summary judgment and preliminary injunction opinion is reported at 377 F.Supp.2d 907 (Grange Pet. App. 35a-92a). Its permanent injunction order (Grange Pet. App. 97a-100a) and other orders (JA 139-40, 232-33, 821-28) are unpublished.

BASIS FOR JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1). This Court granted the Grange's Petition For A Writ Of Certiorari in this case no. 06-713 on February 26, 2007. The judgment of the Ninth Circuit was entered August 22, 2006. The District Court had federal question jurisdiction under 28 U.S.C. §§1331 & 1343.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

A. United States Constitution

The First Amendment of the United States Constitution provides:

> FREEDOM OF RELIGION, SPEECH, AND OF THE PRESS. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const., amend. I (Grange Pet. App. 112a).

The Fourteenth Amendment of the United States Constitution provides in part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law....

U.S. Const., amend. XIV, §1.

B. Washington State Constitution

The Article of the Washington State Constitution establishing the State's legislative branch provides in part:

> Legislative Powers, Where Vested. The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be

called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature.

(a) Initiative: The first power reserved by the people is the initiative. Every such petition shall include the full text of the measure so proposed. .... Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature. If filed at least four months before the election at which they are to be voted upon, he shall submit the same to the vote of the people at the said election. .....

(d) .... All elections on measures referred to the people of the state shall be had at the next succeeding regular general election following the filing of the measure with the secretary of state, except when the legislature shall order a special election. Any measure initiated by the people or referred to the people as herein provided shall take effect and become the law if it is approved by a majority of the votes cast thereon: .... Such measure shall be in

> operation on and after the thirtieth day after the election at which it is approved. The style of all bills proposed by initiative petition shall be: "Be it enacted by the people of the State of Washington." ....

Wash. Const., art. II, §1 (Grange Pet. App. 113a-115a).

C. Washington's Prior Party-Nominating Statute ("Montana" system)

Immediately before Initiative 872, the State of Washington employed what is commonly called a "Montana" party-nominating system. It is set forth in full at JA 488-572.

Washington's version of that "Montana" system prints the candidates of different major parties on different ballots, and then places on the November general election the party's candidate who had received in the preceding primary "a plurality of the votes cast by voters affiliated with that party for candidates for that office affiliated with that party." Wash. Rev. Code 29A.36.191 in effect before I-872 (Grange Pet. App. 142a); see also. Wash. Rev. Code 29A.04.128 in effect before I-872 (Grange Pet. App. 141a) ("Primary. 'Primary' or 'primary election' means a statutory procedure for nominating candidates to public office at the polls.").

The corresponding declaration of candidacy accordingly had the person running for office declare him or her self as a candidate of a particular party:

> I ***am*** a ***candidate of*** the _____ party.

Wash. Admin. Code 434-215-012 in effect before I-872 (emphasis added) (Grange Pet. App. 129a, 131a, 134a).

D. Washington's Top-Two Statute (Initiative 872)

Initiative 872 ("I-872") replaced Washington's "Montana" system. The full text of Initiative 872 is set forth at Grange Pet. App. 116a-126a.

Initiative 872 changed Washington law to define "partisan office" as follows:

> "Partisan office" means a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name.

I-872, §4 (Grange Pet. App. 117a-118a).

The previously-noted declaration of candidacy was accordingly changed to allow persons running for office to make the following public disclosure instead:

my party ***preference*** is _____.

Wash. Admin. Code 434-215-012 until federal court enjoined I-872 (emphasis added) (Grange Pet. App. 129a, 137a).

Initiative 872 then redefined "primary" as follows:

> "Primary" or "primary election" means a procedure for winnowing candidates for public office to a final list of two as part of a special or general election....

I-872, §5 (Grange Pet. App. 118a). And it specified a top-two runoff election as follows:

> For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot; the name of the candidate who received the greatest number of votes will appear first, and the candidate who received the next greatest number of votes will appear second.

I-872, §6(1) (Grange Pet. App. 118a-119a).

Under this top-two system, Washington's election regulations provided:

> Pursuant to Chapter 2, Laws of 2005 [Initiative I-872], a partisan primary does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election. The candidate who

> receives the highest number of votes and the candidate who receives the second highest number of votes at the primary election advance to the general election, regardless of the candidates' political party preference. .... Each voter may vote for any candidate listed on the ballot, regardless of the party preference of the candidates or the voter. ***Voters at the primary election are not choosing a political party's nominees.***

Wash. Admin. Code 434-262-012 until the federal court enjoined I-872 (emphasis added) (Grange Pet. App. 140a).

STATEMENT OF THE CASE

This case revolves around this Court's ruling in *Jones* and the changes in Washington State law after that ruling. The following summarizes that history.

A. Summer 2000: This Court Strikes Down California's Party-Nominating Primary In *Jones*.

This Court struck down California's blanket primary law in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) ("*Jones*"). That law provided:

(1) A person could declare them self to be the candidate of any political party in the primary.

(2) Voters could vote for whomever they wanted in that primary.

(3) The State's general election ballot then designated as party nominee the person who had received the most primary votes among those persons who had declared themselves to be a candidate for that party's nomination.

Cal. Elec. Code §15451 (1996 version); *Jones*, 530 U.S. at 570.

This Court held that allowing people to self-declare themselves to be a candidate for a political party's nomination, and then allowing all voters to chose which one of those self-declared party candidates would be designated as that party's nominee on the general election ballot, violated that party's right to decide who would (and would not) be that party's nominee. 530 U.S. at 577-78.

The dissent argued that this Court's ruling would severely limit States' flexibility to adopt new types of primary systems in the future. 530 U.S. 600-01 (Stevens, J., dissenting).

This Court's majority opinion rejected the dissent's narrow reading of its *Jones* decision. This Court explained that States have broad latitude to allow all voters to vote for whomever they want in a State primary – just as long as State law does not designate the winner of that primary to be a party's nominee on the November election ballot. 530 U.S. at 572-73 & n.4.

To confirm that broad latitude, the *Jones* Court laid down a specific blueprint for how States can structure a top-two primary that is constitutional. That blueprint focused on the result specified by a State's primary law. And it confirmed

that a top-two primary is constitutional if it specifies the nonpartisan result of choosing the two most popular candidates overall instead of specifying the partisan result of choosing the nominee for a political party. As this Court's ruling explained:

> Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot – which may include nomination by established parties and voter petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. ***This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee.***

530 U.S. at 585-86 (emphasis added).

B. Fall 2003: Washington's Prior Party-Nominating Primary Is Struck Down In Reliance on *Jones*.

At the time of this Court's decision in *Jones*, Washington's primary law provided:

(1) A person could declare them self to be the candidate of any political party in the primary;

(2) Voters could vote for whomever they wanted in that primary;

(3) The State's general election ballot then designated as party nominee the person who had received the most primary votes among those persons who had declared themselves to be a candidate for that party's nomination.[1]

Since Washington's party-nominating law was similar to California's, Washington's law was stricken down in reliance on this Court's *Jones* ruling. *Reed*, 343 F.3d at 1203, 1207.

C. Spring 2004: Washington Adopts A "Montana" System In Response To *Jones*.

The Washington legislature responded by adopting the "Montana" system currently used in twelve States.[2] That "Montana" system provides:

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[1] Wash. Rev. Code §29.30.095 & .020(3) (pre-2003 version) (the party designation on the ballot signified "the political party...of each candidate") and the Declaration Of Candidacy under that statute which provided that the listing of a party name designated that person as a ***"candidate of"*** that political party. Wash. Admin. Code 434-215-012 (pre-2003 version) (Grange Pet. App. 129a, 131a, 134a). See also *Democratic Party of Washington v. Reed*, 343 F.3d 1198, 1201 (9th Cir. 2003).

[2] Grange Pet. App. 9a-10a. Those twelve States' statutes are: **Mont**. Code Ann. §§13-10-209, -301 (2005); **Ga**. Code Ann. §21-2-224 (2006); **Haw**. Rev. Stat. §12-31 (2005); **Idaho** Code Ann. §34-904 (2006); **Mich**. Comp. Laws §§168.576, .570 (2006); **Minn**. Stat. §204D.08 (2006); **Mo**. Rev. Stat. §115.397 (2006); **N.D.** Cent. Code §16.1-11-22 (2005); **Vt**. Stat. Ann. tit. 17 §§2262, 2263 (2005); **Va**. Code Ann. §24.2-530 (2006); **Wis**. Stat. §§5.58, 5.62 (2005); **Wash**. Rev. Code §29A.52.151 (2006).

(1) A person can declare them self to be the candidate of any political party in the primary.

(2) Voters cannot vote for whomever they want in the primary. Instead, they have to choose between voting for the candidates of one party or the other.

(3) The State's general election ballot then designates as party nominee the person who had received the most primary votes among those persons who had declared themselves to be a candidate for that party's nomination.

Wash. Rev. Code 29A.36.191 and 29A.04.128 in effect immediately before I-872 (Grange Pet. App. 142a & 141a); Wash. Admin. Code 434-215-012 in effect immediately before I-872 (Grange Pet. App. 129a, 131a, 134a).

D. Fall 2004: Washington Voters Replace The "Montana" System With A Top-Two System In Reliance On *Jones* (Initiative 872).

Washington voters used the Montana system for the first time in the September 2004 primary.

They did not like it. Two months later those same voters voted 60%-40% to replace the Montana statute with a top-two statute (Initiative 872). Grange Pet. App. 10a.

Washington's voters enacted this top-two statute pursuant to the legislative authority that they had expressly reserved to themselves in

Article II, section 1 of their State Constitution. (The relevant text of Washington's Constitution is set forth above at pages 2-4.)

As the Ninth Circuit acknowledged, Washington's new top-two primary law was designed to comply with this Court's ruling in *Jones*. Grange Pet. App. 110a-111a. As the following pages explain in more detail, Washington's new top-two law accordingly provided as follows:

(1) The declaration of candidacy for the primary was changed so a person could no longer declare them self to be the candidate of any political party.

(2) Voters would be allowed to vote for whomever they want in the primary.

(3) The State's general election ballot no longer designated any person as any party's nominee. Instead, that ballot designated the primary's top two vote getters.

As the following pages also confirm, the difference between Washington's top-two statute and the constitutional top-two statute described in *Jones* was the piece of Washington's statute that allows a person running for certain offices to disclose on the ballot the name of the political party (if any) which he or she personally prefers.

More specifically, Washington's new top-two statute provided that the top two vote getters in the State's primary advance to the November general election:

> Section 6(1): .... For any office for which a primary was held, only the names of the top two candidates will appear on the general election ballot; the name of the candidate who received the greatest number of votes will appear first, and the candidate who received the next greatest number of votes will appear second. (Grange Pet. App. 118a-119a.)

Another part of this top-two statute permitted persons running for certain offices to disclose on the ballot the name of the party (if any) which he or she personally prefers. Washington's new statute defined those offices as "partisan offices" to tie the statute's use of the term "partisan" to the type of office being voted on rather than the type of result produced by that vote:

> Section 4: .... "Partisan office" means a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name. (Grange Pet. App. 117a-118a.)

The State election regulations in the Washington Administrative Code ("WAC") were accordingly amended to reflect this new statute's fundamental change in the meaning of the declaration of candidacy filed by a person running for public office.

As noted earlier, the declaration of candidacy under Washington's prior party-nominating statutes had the person running for office declare him or her self to be a ***candidate of*** a political party:[3]

> I am a ***candidate of*** the _____ party.

Given the nonpartisan result specified by Washington's new top-two statute, however, the State changed its filing declaration to instead allow each person running for office to make the following public disclosure instead:

> my party ***preference*** is _____.

Wash. Admin. Code 434-215-012 until federal court enjoined I-872 (emphasis added) (Grange Pet. App. 129a, 137a).

As noted earlier, Washington's new top-two statute tied its use of the term "partisan" to the type of office being voted on rather than the type of result that vote produced. Washington's top-two election regulations according confirmed with respect to the above declaration's "partisan" statement of personal party preference that:

> Pursuant to Chapter 2, Laws of 2005 [the new top-two statute], a partisan primary does not serve to determine the nominees of a political party but serves to winnow

[3] Wash. Admin. Code 434-215-012 under the State primary statutes in effect before I-872 (emphasis added) (Grange Pet. App. 129a, 131a, 134a).